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IN THE

Supreme Court

of the United States

OCTOBER TERM, A. D. 1941.

No. 519

THE CAMDEN FIRE INSURANCE ASSOCIATION
A CORPORATION,
Petitioner,

VS.

JENNIE M. SUNDQUIST, ADMINISTRATRIX OF THE ESTATE OF ANTON E. SUNDQUIST, DECEASED,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The Stark County News, Toulon, Ill.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SUPPLEMENTAL STATEMENT OF FACTS.

Respondent disagrees in part with the statement of facts made by petitioner and submits the following supplemental statement of facts.

Respondent denies the assertion on page 7 of petitioner's summary statement adopted as its statement of facts, that there was no evidence in support of the contention that the claimed forged invoices designated as defendant's

Exhibits 4, 5 and 6 in this case were manufactured by defendant. The dispute in the evidence about the responsibility for these papers raised one of the issues of fact submitted to the jury on the trial.

It is shown in the evidence that a few days after the fire when the insured, Sundquist, found there was to be a dispute as to liability he employed one Elwood Kroos, an insurance adjuster of long experience, to assist him in presenting his claim. (Trans. 42.) Kroos made up an itemized and detailed proof of loss and, upon request of defendant's adjusters, supplemented it with a list of the articles of furniture and fixtures claimed to have been consumed in the fire.

While cooperating with adjusters for defendant, Kroos and Sundquist called them in to the Sundquist Toulon store shortly after the fire to go over and examine the books, invoices and papers saved from the fire and being used by Sundquist and Kroos in making up the proof of loss. It is contended by defendant that during that conference in which defendant's adjusters Peck and Keeley had complete access to all the data of the Sundquist stores consisting of hundreds of items and entries, Sundquist picked up Defendant's Exhibits 4, 5 and 6, the Schiller Piano Company invoices, and turned them over to Peck and Keeley with the statement in an ordinary conversation that they were duplicate invoices for the purchase of pianos destroyed in the fire. (Trans. 112.)

Sundquist died prior to the trial in the instant case but Kroos, his adjuster, testified that he was present during the conversation of Peck and Keeley with the insured, Sundquist, and Kroos denied that Defendant's Exhibits 4, 5 and 6 were present in the room during that conversation. He further denied that the exhibits were turned

over to Peck and Keeley by Sundquist at that time and that Sundquist ever told anyone that those exhibits were "invoices which he had obtained from the Schiller Company." (Trans. 161.)

Kroos testified that he never saw those exhibits until the second trial growing out of the Sundquist fire, although Peck and Keeley admitted that they had been in possession of the said invoices all of the time since the conference in Sundquist's store in January, 1937, a few days after the fire. (Trans. 113, 115.)

It is not contended by defendant that Peck and Keeley, or any representative of the defendant, relied upon these invoices in any respect in the further transactions for the purpose of settling the loss, and it is not contended by defendant that defendant was deceived as to the value of the pianos mentioned by virtue of the exhibits or that their action or course in availing themselves of all information with respect to the value of the pianos was in any wise restricted or diverted by receiving the said invoices.

It will be noted that the invoices, Defendant's Exhibits 4, 5 and 6, do not have the name of Sundquist shown upon them and are blank invoices which might be used for any purpose. The exhibits are unusual and irregular in form.

The exhibits concerned the value of three pianos in a $20,000 stock of goods. Defendant had equal access to the information afforded by the exhibits with the insured and availed itself of such information by calling the representatives of the Schiller Company to deny the genuineness of the exhibits. It is not claimed that Sundquist submitted the exhibits under oath or that Kroos used the in-

formation contained in them in making up the proof of loss and list of merchandise attached.

The evidence shows that Peck and Keeley had access to Sundquist's typewriter in the Sundquist store at Toulon on the day when Peck and Keeley claimed to have obtained the invoices. It was stated by John Sundquist, son of the deceased insured, that Peck and Keeley were in the store for several hours and used the Sundquist typewriter present there. Their interests in denying and preventing recovery upon the policies was equal to the interests of the insured Sundquist in seeking to recover upon the policies.

It is true that there is some long-hand writing on Defendant's Exhibit 6 which is Sundquist's hand writing but there is no evidence in the record that he did the typewriting. He could not operate a typewriter. (Trans 81.)

Petitioner also declares on Pages 8 and 9 of the summary statement that the Emery Bankruptcy Schedule, marked "Defendant's Exhibit 53" in this case, was held to be admissible in evidence in the case of *Sundquist* v. *Illinois Fire Ins. Co.*, 305 Ill. App. 160. Petitioner inserted the opinion in that case in an appendix to its petition. The Appellate Court of Illinois in that opinion mentioned the same exhibit and said, "In the view of the condition of the record at the time this offer was made, we are inclined to think it was admissible." However, the record in the Appellate Court of Illinois is not before this court and neither the trial court nor the Circuit Court of Appeals in this case could be governed by the views of the Appellate Court of Illinois on a different record. The admissibility of Defendant's Exhibit 53 depends on the record in this case.

There was no proof that the articles shown in the proof of loss were stock which Sundquist bought at the Emery bankruptcy sale. The list of the Emery bankruptcy stock in Exhibit 53 and the list of articles lost in the Sundquist fire fifteen years later contained, of course, similar names because both were furniture stocks and fixtures. Counsel for plaintiff objected to the admission of the Emery bankruptcy list when it was offered and stated (Trans. 137):

> "That of course is aimed at the question of value. Even if the question of value as remote as fifteen years prior to this fire was of any significance, still this statement is wholly immaterial. We are not litigating over the question of what Sundquist paid for this bankrupt stock. That is too remote. Then it is in proof here and without any contradiction that there was no saleable article in this stock of goods in 1936 that came out of the Emery stock. * * * Somebody said there were two or three old articles out of the Emery stock, and there is no statement of their value."

This objection was sustained on the trial and the Circuit Court of Appeals found no error upon a review of the record. The Circuit Court of Appeals in its opinion said (119 Fed. 2d 955, 958):

> "Error is also assigned because the court refused to receive proffered evidence of plaintiff's purchase of a stock of goods in 1922 at a price lower than assured stated it to be. This stock furnished no part of plaintiff's loss as all of said goods had long before been sold. On this theory, the ruling was correct. The court was not 'trying' a transaction in no way connected with the loss in question."

ARGUMENT.

Summary of Argument.

A. The reasons given for the allowance of the writ are insufficient.

1. The alleged misunderstanding and mis-application by the Circuit Court of Appeals of the case of *Soler* & *Co.* v. *United Firemen's Ins. Co.*, 299 U. S. 45, does not warrant a review of this case.

   Supreme Court Rule 38, para. 5 (b) *Deputy* v. *Dupont*, 308 U. S. 488, 500, 60 Sup. Ct. Rep. 363, 369, (dissenting opinion of Mr. Justice Roberts).

2. The Circuit Court of Appeals was not obliged to follow the decision of the Illinois Appellate Court with reference to the admissibility of Defendant's Exhibit 53 in this case, and no important question of local law is involved.

   a. The statement in the opinion in *Sundquist* v. *Illinois Fire Ins. Co.*, 305 Ill. App. 160 (Appendix to Petition for certiorari, page v) that the Emery bankruptcy stock lists were admissible was based on the condition of the record in that case and could not control the admissibility of the same exhibit in this case upon a different record.

   b. The admissibility of Defendant's Exhibit 53 is not an important question of local law.

B. The evidence on the charge of fraud and false swearing was in conflict and the trial court rightly submitted the case to the jury.

1. The Circuit Court of Appeals in its opinion re-

viewed the evidence and declared a dispute existed over the responsibility for the claimed fraudulent papers. *Sundquist* v. *Camden Fire Ins. Assn.*, 119 Fed. 2d 955, 958.

2. There was conflicting evidence on the trial with reference to the alleged fraud.

   a. There was evidence that Defendant's Exhibits 4, 5 and 6 were not presented by Sundquist to defendant.

   b. There was slight evidence that Sundquist prepared the papers and some evidence that defendant's adjusters could have prepared them.

   c. The evidence showed that these exhibits were not produced until after Sundquist obtained a verdict on the first trial growing out of the fire in this case.

   d. The evidence showed a vigorous investigation by defendant, making it improbable that defendant would be misled or defrauded by any papers obtained from Sundquist.

   e. The claimed evidence of fraud concerned only three pianos in a loss of more than $20,000.00.

3. The dispute in the evidence about the claimed fraudulent accounts required the submission of the issue to the jury.

   Soler & Co. v. *United Firemen's Ins. Co.*, 299 U. S. 45.

   Fairmount Glass Works v. *Cub Fork Coal Co.*, 287 U. S. 474.

   Sundquist v. *Hardware Mutual Fire Ins. Co.*, 296 Ill. App. 510, 523.

4. Defendant's cases distinguished.

Point A. The Reasons Given For the Allowance of the Writ Are Insufficient.

1. Petitioner states two reasons for the exercise of the discretion of this court in the allowance of the writ of certiorari (Page 10 of petition). First, it is contended that the decision of the Circuit Court of Appeals should be reviewed because it was predicated upon a misunderstanding of the scope and effect of the decision in *Soler & Co.* v. *United Firemen's Insurance Co.*, 299 U. S. 45. Petitioner does not indicate how this reason could be within Paragraph 5 (b) of Rule 38 of this court which classifies the kinds of cases in which this court will grant certiorari to a Circuit Court of Appeals.

The alleged misunderstanding and misapplication of the decision in *Soler & Co.* v. *United Firemen's Insurance Co.*, 299 U. S. 45, does not warrant a review of this case here. Even if it be conceded that evidence of fraud may be so positive as to require a directed verdict against the insured, which is denied by plaintiff, the question involves only an examination of the evidence in this case to determine whether or not the issue of fraud and false swearing should have been taken from the jury.

While defendant states that it contends that the *Soler & Co.* decision was misunderstood, its argument indicates that it also contends that the Circuit Court of Appeals has overlooked or misconstrued the evidence of fraud in the record. This court should not attempt to examine all of the evidence in this case after the Circuit Court of Appeals has thoroughly performed that duty. The Circuit Court of Appeals in its opinion (119 Fed. 2d 955) reviewed the evidence in detail in respect to the evidence of loss and damage and the evidence of fraud and false swearing and gave especial attention to the views of defendant

in regard to Defendant's Exhibits 4, 5 and 6, the claimed forged invoices, and the letter from the insured appearing on page 7 of the petition in this court. In the opinion of the Circuit Court of Appeals in this case it is stated (p. 958):

> "Without discussing the evidence in detail, we conclude that the court rightly submitted the case to the jury. *Soler & Co.* v. *United Firemen's Ins. Co.*, 299 U. S. 45, 57 S. Ct. 54, 81 L. Ed. 30. The extent to which courts go in determining the presence of a jury question is shown by the opinion in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439. While we need not follow the *Cub Fork Coal Co.* opinion the entire distance (see opinion in the Court of Appeals, 7 Cir., 59 F. 2d 539), in order to affirm the judgment in this case, we believe the language of the court in *Soler & Co.* v. *United Firemen's Ins. Co.*, supra, is particularly applicable to this case, (see 299 U. S. at pages 49, 50, 57 S. Ct. 54, 81 L. Ed. 30)."

There is no dispute in this case about the principles of law announced in the opinions in the cases of *Soler & Co.* v. *Ins. Co.*, 299 U. S. 45, and *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, cited in the opinion of the Circuit Court of Appeals. They are merely examples of the application of the well established rule that a dispute of fact is for the jury and not for the court. Defendant disagrees with the Circuit Court of Appeals on the evidence in this case, and declares on page 19 of its brief in support of its petition here that the Circuit Court of Appeals has held in this case that "no matter how palpable the evidence of fraud and false swearing, the question remains one for the jury." It is said that the Circuit Court of Appeals cited the *Soler & Co.* case in support of such a proposition. This view of the opinion

of the Circuit Court of Appeals in this case is not supported by anything stated in the opinion and is squarely contradicted by the language of the opinion of the Circuit Court of Appeals just quoted. The Circuit Court of Appeals reviewed all the evidence in this case and found a substantial dispute on the facts concerning fraud and false swearing. Neither the trial court nor the Circuit Court of Appeals had a right to consider the evidence of fraud and false swearing to be "palpable" or undisputed.

Defendant has no right to ask this court to review such a question in view of the limitations set forth in paragraph 5 (b) of Rule 38 of this Court and the announced practice of this court on petitions for certiorari.

> "The function of this court is to resolve conflicts of decision and to settle important principles of law. The discretionary power of this court to review judgments of lower federal courts was not intended to be exercised in every case where those courts have adjudicated the conflicting claims of the parties, which involves no important principle of law and no conflict of decision amongst the federal courts. Our rules adopted to carry out the policy of the statutes granting the power to bring cases here by certiorari have apprised the Bar and the public that we will not take cases fully heard and adjudicated below for the mere purpose of re-examining the correctness of the result. See Rule 38, par. 5, 28 U. S. C. A. following section 354." (*Deputy* v. *Dupont*, 308 U. S. 488, 500, dissenting opinion.)

2. The second reason on which defendant relies in petitioning this court for certiorari (Petition p. 10) is the refusal of the Circuit Court of Appeals to follow the decision of the Appellate Court of Illinois as to the admissibility of Defendant's Exhibit 53, the Emery bank-

ruptcy schedule. Defendant assumes that the statement in the opinion of the Appellate Court of Illinois concerning this exhibit and with reference to its admissibility in another case establishes the law of Illinois controlling the admissibility of the same exhibit in this case. No authority is cited for this unusual assumption. The trial court in this case was required to pass upon the admissibility of Defendant's Exhibit 53 on the basis of the other evidence in this case. The admissibility of the same exhibit in a suit on a different policy against a different defendant in which different evidence was produced is irrelevant. This court cannot examine the record involved in the case of *Sundquist* v. *Illinois Fire Ins. Co. of Peoria,* 305 Ill. App. 160, where it is claimed this evidence was held admissible. No principle of law is involved. The only question decided in that case as stated by the opinion was the admissibility of the exhibit in view of the record. It cannot be contended that the casual comment of the Appellate Court of Illinois in the case referred to concerns an important question of local law with which the opinion of the Circuit Court of Appeals in this case is inconsistent.

It is, therefore, respectfully submitted that the only two reasons given in the petition for the exercise of the discretion of this court in granting certiorari are insufficient and that petitoner has entirely failed to show any justification for the requested review of the evidence in this case.

Point B. The Evidence on the Charge of Fraud and False Swearing Was In Conflict and the Trial Court Rightly Submitted the Case to the Jury.

1. The principal reason advanced by petitioner for the review of this case rests on the premise that the evidence of fraud and false swearing was undisputed. This

contention is unfounded and contradicts the declaration of the Circuit Court of Appeals in its opinion (119 Fed. 2d. 955, 958). The evidence concerning the origin and significance of Defendant's Exhibits 4, 5 and 6, the claimed forged invoices, and the other papers claimed to show fraud was voluminous, and inconsistent in many respects. The Circuit Court of Appeals in its opinion expressly stated that there was a dispute in the evidence about the responsibility for the claimed fraudulent papers.

2. One of the inconsistencies in the evidence was based on the testimony by defendant's adjusters that Sundquist handed the papers marked "Defendant's Exhibits 4, 5 and 6" to them in a conference in Sundquist's Toulon store shortly after the fire. As pointed out in the supplemental statement of facts, Sundquist, the insured, died before the trial in this case, but the witness, Kroos, his adjuster, testified that he was present during the same conversation and denied that the exhibits were present in the room or were turned over to Peck and Keeley, defendant's adjusters, at that time and denied that Sundquist said that those exhibits were invoices which he had obtained from the Schiller Co. (Trans. 161.)

While defendant produced evidence that the exhibits in question were prepared on Sundquist's typewriter in his Toulon store and that one of the exhibits bore some pencil notations by Sundquist, it was also undisputed that Sundquist could not operate a typewriter (Trans. 81). There was no contention that Sundquist ever made any statement under oath concerning these exhibits and it was apparent that no reliance was ever placed upon them by defendant or its adjusters. There was a complete absence of direct evidence as to who prepared these exhibits, although the witness Kroos, who had charge of preparing the proofs of loss for Sundquist and was familiar with

all of the information used in making up the proofs of loss and itemized lists, testified that he never saw the exhibits in question until the second of the three trials on the Sundquist insurance policies which took place some years after the fire. (Trans. 161.) These exhibits were produced and offered in evidence upon the second trial, and upon the trial in this case, by the defendant. Defendant's adjusters Peck and Keeley, admitted that they had been in possession of these invoices all of the time since the conference in Sundquist's store in January, 1937, a few days after the fire (Trans. 113, 115).

All through the evidence it was apparent that reliance by defendant or its adjusters on any of the papers, proofs or figures submitted by Sundquist in an effort to obtain payment of his insurance was most improbable. This tended to refute the contention that Sundquist's conduct was intended to mislead or defraud defendant. Defendant's evidence showed that from the first it engaged the services of expert adjusters and detectives who, with the assistance of the State Fire Marshal and others, made a complete investigation.

Sundquist knew the investigation was being made and must have known that he could not deceive defendant in any way. Defendant does not claim it was ever deceived by Sundquist. The pecuniary interest of Sundquist in obtaining his insurance was no greater than the pecuniary interest of defendant and the other insurance companies collaborating in the defense. The alleged fraud in connection with Defendant's Exhibits 4, 5 and 6 concerned only three pianos in a stock of goods claimed to be worth over $20,000.00.

Counsel point to the letter, on page 7 of the petition written to the Cable Company of Chicago by the insured

with reference to a Cable piano and a Hamilton piano, as evidence of an inclination on the part of the insured to defraud the defendant. The letter was not directed to the defendant. It was an attempt to get invoices with respect to pianos consumed in the fire, but as we view it, not necessarily containing evidence of culpability.

Sundquist stated that he was required to get invoices and asked the Cable Company to help him out. Wherein is this letter evidence of fraud of the insured on this record? Defendant was not misled. The letter was not addressed to defendant and was obtained by them by means of the industry and genius displayed in obtaining every scrap of evidence available on the issue of the claimed forfeiture of the insurance contract sued on in this case.

3. All of these conflicting circumstances were for the consideration of a jury. The burden was on defendant to prove fraud and it failed to sustain that burden. The jury was well and thoroughly instructed by the trial judge on all of these issues (Trans. 168). No objection is made to these instructions. It is well settled that plaintiff has the advantage of all favorable inferences on this question and, in view of the verdict of the jury, the approval of the trial judge and of the Circuit Court of Appeals, it cannot be said no reasonable mind could find for the plaintiff on the issue of fraud. Even if this court should decide to review the decision of the Circuit Court of Appeals the only questions submitted in the petition are questions of fact which have been passed upon by the jury, the trial court and the Circuit Court of Appeals, favorably to plaintiff in every instance. *Soler & Co.* v. *United Firemen's Ins. Co.*, 299 U. S. 45, *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, *Sundquist* v. *Hardware Mutual Fire Ins. Co.*, 296 Ill. App. 510, 523.

Cases Cited by Defendant Distinguished.

4. Plaintiff contends that the cases cited by defendant under Point A of the argument (Petition p. 15) are entirely distinguishable on the facts from this case. Many of these cases were discussed in the briefs in the Appellate Court of Illinois in the first suit tried by the insured growing out of this fire and the opinion appears in *Sundquist* v. *The Hardware Mutual Fire Ins. Co.*, 296 Ill. App. 510. With reference to the cases of *Kavooras* v. *Ins. Co. of Illinois*, 167 Ill. App. 220, and *Butler* v. *Security Ins. Co.*, 244 Ill. App. 379 and several other cases from other jurisdictions the court said (p. 521):

> "The facts in these cases relied upon by appellants are clearly distinguishable from the facts as found in this record."

In the case of *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81, cited by defendant, the insured admitted that he intentionally made false statements under oath on material matters affecting his insurance claim. In the case of *Moreau* v. *Palatine Ins. Co.*, 84 N. H. 422, 151 Atl. 817, also cited by defendant, the false statements of the insured made under oath in a deposition and on the trial were so clearly fraudulent and dishonest that the court was required to enforce the forfeiture provisions of the policy. On the other hand, the charges of fraud in this case against Sundquist are by no means admitted or undisputed. Defendant does not rely on false statements made under oath but claims only that Exhibits 4, 5 and 6, unsigned and unsworn papers of doubtful origin, were presented to defendant after the fire. Almost every fact on which this charge is based is in dispute in the evidence, as was recognized in the opinion of the Circuit Court of Appeals. The cases cited by defendant under Point A are, therefore, not in point because the facts are substantially different.

CONCLUSION.

Respondent, therefore, respectfully objects to the granting of the writ of certiorari. Petitioner has failed to present any reason for the exercise of the discretion of this court in granting the writ and the only questions presented for review by the petitioner were questions of fact for the jury.

Respectfully submitted,

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